

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

DERRICK L. JOHNSON,

Petitioner, : Case No. 3:15-cv-090

- vs -

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

JEFFREY LISATH, Warden,
Pickaway Correctional Institution,

Respondent.

**ORDER VACATING STAY; RENEWED REPORT AND
RECOMMENDATIONS**

This is a habeas corpus case brought under 28 U.S.C. § 2254 to obtain relief from Johnson's conviction on two counts of aggravated murder, one count of aggravated robbery, and one count of attempted aggravated murder, all counts carrying firearm specifications, in the Montgomery County Common Pleas Court in 1992. Upon initial review of the Petition under Rule 4 of the Rules Governing § 2254 Cases, the Magistrate Judge recommended dismissal with prejudice because the Petition was time-barred (Report and Recommendations, ECF No. 6, PageID 137). The Report was filed on March 12, 2015, and Petitioner was notified of his obligation to file any objections within seventeen days. *Id.* at PageID 137-38.

Instead of filing objections, Mr. Johnson moved to stay this case and hold it in abeyance pending exhaustion of state court remedies (Motion, ECF No. 8). The Court granted that Motion and withdrew the Report, noting an intention to conduct a new initial review once state court proceedings were complete (ECF No. 9, PageID 153). District Judge Rice then ordered that the

case be administratively processed (ECF No. 10).

This Court is now advised of the following actions by the Ohio courts.

June 1, 2015 – case remanded to the Common Pleas Court to consider a motion for relief from judgment. *State v. Johnson*, Case No. 26339, (2nd Dist. Jun 1, 2015)(copy at ECF No. 11, PageID 157 et. seq.)

July 8, 2016 – Common Pleas Court’s denial of motion for leave to file a delayed motion for new trial affirmed. *State v. Johnson*, Case No. 26339, 2016-Ohio-4888, 2016 Ohio App. LEXIS 2669 (2nd Dist. July 8, 2016)(copy at ECF No. 14-1, PageID 198-223.

July 8, 2016 – Common Pleas Court’s denial of second motion for leave to file a delayed motion for new trial affirmed. *State v. Johnson*, Case No. 26795, 2016-Ohio-4889, 2016 Ohio App. LEXIS 2658 (2nd Dist., Jul 8, 2016)(copy at ECF No. 14-1, PageID 226-242.

December 28, 2016 – The Ohio Supreme Court declined to accept jurisdiction over Johnson’s appeal in Second Dist. Case No. 26339 (Case No. 2016-1253). *State v. Johnson*, 2016-Ohio-8438, 2016 Ohio LEXIS 3124 (Dec. 28, 2016).

With these Ohio state courts decisions, it appears that Johnson has exhausted his possible state court remedies. It is accordingly ORDERED that the Stay herein be, and it hereby is, VACATED. The administrative processing of this case is also VACATED and the case is returned to the active docket.

Nothing that the Ohio courts have done over the court of these recent proceedings impacts the analysis the Magistrate Judge made in the initial Report and Recommendations. Johnson’s filing is still exceptionally untimely and nothing the Ohio courts did in his recent proceedings affected the finality of the judgment against him and thereby restarted the statute of limitations. It is accordingly recommended again that the Petition herein be DISMISSED WITH

PREJUDICE. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

January 18, 2017.

s/ **Michael R. Merz**
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).